APPENDIX

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Charles Edward Ramos 53

PRESENT: _____ PART _____
Justice

Index Number : 600704/2006
EURYCLEIA PARTNERS, LP,
vs
AMERICAN EXPRESS TAX
Sequence Number : 005
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion denied as reflected in the Court's transcript. A party to this matter may request that this Court "So Order" the transcript by submitting a copy of the Court Stenographer's record, together with an errata sheet correcting all errors in the record, to the Clerk of Part 53. If all parties consent to theproposed corrections or agree that no corrections are required, a stipulation to that effect shall accompany said errata sheet or transcript. In the absence of consent, the requesting party shall notice the record for settlement puruant to CPLR Rule 5525(c).

If an order is required to effectuate this Court's ruling, any party may submit a proposed order*p17 26 to 53 (not to the Commercial Division's Clerk's office) together with a copy of the transcript. In the event the ruling requires the entry of a judgment or other action by the clerks, the submission of a proposed order or judgment is mandatory and shall be in form acceptable to the Judgment Clerk or other appropriate clerk.

FILED
MAR 15 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/5/07

HON. CHARLES E. RAMOS J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 53

- X

EURYCLEIA PARTNERS, L.P., ET AL,

Plaintiffs,

INDEX NUMBER:
600704/06

- against -

AMERICAN EXPRESS TAX & BUSINESS SERVICES, INC., N/K/A RSM McGLADREY, SEWARD, & KISSEL, LLP, and TRIDENT FINANCIAL SERVICES, LLC,

Defendants.

- X

60 Centre Street
New York, New York
January 31, 2007

BEFORE:

HONORABLE CHARLES E. RAMOS, Justice.

APPEARANCES:

REED SMITH, LLP
Attorney for the Plaintiffs
599 Lexington Avenue - 29th Floor
New York, New York 10022
BY: LANCE GOTTHOFFER, ESQ.
GIL FEDER, ESQ.
ELENA P. LAZAROU, ESQ.

SADIS & GOLDBERG, LLP
Attorneys for Defendant
Trident Financial Services
551 Fifth Avenue
New York, New York 10176
BY: DOUGLAS R. HIRSCH, ESQ.
JARRET A. KAHN, ESQ.

(Continued on next page.)

APPEARANCES: (Continued)

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
Attorneys for Defendant Seward & Kissel, LLP
1285 Avenue of the Americas
New York, New York 10019-6064
BY: GERARD E. HARPER, ESQ.
JACQUELINE RUBIN, ESQ.

Margaret Baumann
Official Court Reporter

Proceedings

THE COURT: Defendant's motion.

MR. HARPER: Thank you, your Honor.

Would it cause a disservice in the gallery if I use the podium?

THE COURT: No, no. Of course not. Just bring it over there close to stenographer.

MR. HARPER: I have a pretty good voice.

THE COURT: If we do not hear you, we will bring it over.

MR. HARPER: May it please the Court:

My name is Gerard Harper. I am from Paul, Weiss, Rifkind, Wharton & Garrison, LLP, and I represent the distinguished law firm of Seward & Kissel, which has been accused in this lawsuit of not malpractice, but of the most egregious kinds of allegations and the most grave kinds of allegations that could be made against a lawyer or law firm for fraud, breach of fiduciary duty, aiding and abetting knowingly a fraud and a breach of fiduciary duty.

The basic background is that my client Seward & Kissel organized, prepared the offering memoranda and subscription agreements for a hedge fund and a management company that was to run the hedge fund which I will collectively refer to as Wood River (phonetic).

The Wood River Hedge Fund went out and raised

money from limited partners who invested in hedge funds beginning in 2003.

In the offering memorandum, which is very, very extensive and designed for highly sophisticated investors, under the securities laws it has to be, it said, Look, we have the flexibility to invest in anything you want and at any given point in time. You know, we are not bound by anything in terms of where we are going to put the money. But, typically, typically our plan going forward is to put no more than 10 percent of the total fund assets into any one company.

In September of 2005, going forward, now two years after, well over two years after the money had started to be raised, the SEC comes in and discovers that the fund owns over 35 percent of a company called End Wave (phonetic) in California, and the SEC's interest in that is because there is no filings by Wood River that it owns 35 percent of the company.

THE COURT: It would have to file upon ownership of 5 percent.

MR. HARPER: Five percent. Then you file a 10, 15, and they all have different consequences depending on, even at five, your motive.

Proceedings

THE COURT: The hedge fund does not do that.

MR. HARPER: The hedge fund does not do that. It has not made any filings, and it turns out that the 35 percent that it owns of End Wave comprises something in excess of 60 percent of the total assets of the fund.

THE COURT: And I take it, the stock fails?

MR. HARPER: Pardon me?

THE COURT: I take it the stock fails. It tanks. Otherwise, we would not be here.

MR. HARPER: And guess what happens? Then margin calls, and so everything collapses at the end of September.

The SEC commences an action. A couple of weeks later, a receiver is appointed. My client resigns within two days of the discovery of this from the representation of both the management company and the fund.

And then, as night follows day, not from the receiver, no lawsuit from the receiver, nor claim by the SEC, a group of hedge funds from the Cayman Islands bring an action against my client alleging fraud, the firm committed fraud, a breach of fiduciary duty, aiding and abetting and so forth.

So, Seward & Kissel not only prepared the

initial memo, but also continued to represent the fund.

Seward & Kissel continued to perform discreet tasks for the fund overtime.

THE COURT: Okay.

MR. HARPER: But, and it is going to be important, that you -- it is just like a corporation, when I represent a corporation, I am not necessarily -- I am not their mother. I do not know what they are doing. I do not know whether they are filing. I do not. That is not my responsibility. My responsibility is to do what they ask me to do.

THE COURT: I am assuming that the plaintiffs have alleged in this case Seward & Kissel did know and participated.

MR. HARPER: We are going to analyze that, Judge. We do not think we do. That is what I am here to talk about, and I am here to talk about the law, what the complaint says, and I am going to focus primarily on one main issue.

THE COURT: I take it no answer has been filed yet.

MR. HARPER: Correct.

MR. GOTTHOFFER: That is correct, your Honor.

MR. HARPER: One main issue, which is a breach of duty, because this complaint is a dagger at the

heart of what a lawyer is and what a lawyer's duty is, so that is going to be the dominant theme, but I am going to talk a little bit about lies and a little bit about standing if I may.

Now, with respect to, you know, your Honor, more than I do than when a company collapses, including when a hedge fund collapses, all right, the investors look around, and anybody who is at the scene of the accident is immediately finding themselves on the south side of a caption. So, this is not the first time that investors in a hedge fund have tried to sue the hedge fund lawyers. And none of them, not one, has gotten past the pleading stage.

And happily, within the last two weeks, the Southern District issued a brand new decision directing that point involving the Bayou Hedge Fund, In Re: Bayou Hedge Funds, which dwarfs the collapse of Wood River in the terms of the volume of dollars and the like, and people went to jail and so forth.

And, I would like, if I could, of course, permission to hand up a copy because it just a new, brand new decision.

THE COURT: Before we get there, let's get a little more specific here. What kind of allegations are we talking about?

Proceedings

I am looking at a complaint. You are saying it does not state a cause of action or you have documentary action?

MR. HARPER: I am saying it fails to state a claim of action.

THE COURT: Okay.

MR. HARPER: And as a matter of law, I think I could sum up in one sentence, why it does not. My client owed these plaintiffs no duty whatsoever of any kind or character, except two duties that every human being owes every other human being, lawyers and non-lawyers alike:

Number one, I cannot make a false representation of fact. I cannot lie.

And, number two, I cannot provide substantial assistance to somebody else who I know is lying.

So, let me repeat that. This whole case turns on that one sentence. My client owed these plaintiffs no duty except the duty not to make an affirmative lie, or to substantially assist somebody else in making an affirmative lie.

So, that really boils down to two questions for you, am I right? What does a lawyer owe to a third person? Is a lawyer a whistle blower for a client when the lawyer comes in to, comes in to possession of

information, is he obligated to? That has been debated all over the country.

New York has answered that question. We will go into a second --

THE COURT: I am telling you, this is not a Sarbanes case.

MR. HARPER: No, your Honor, Sarbanes governs only public companies, and the SEC has limited regulatory authority over hedge funds. In fact, it may change as a result of some recent headlines, but that is the way the law was at the time. So, it is not, it is not a Sarbanes issue.

So, who do we owe a duty to? We owe a duty to these investors which were only some of the investors in these? If I rewrite the code of professional responsibility and the law of bar in the case of New York. Now, in Bayou the case, have we handed it up? May I? It is a brand new case.

THE COURT: Of course, you will not continue unless I let you hand up the case.

(Handing.)

THE COURT: You handed the case up, now continue please.

MR. HARPER: I read directly on point, it says:

Proceedings

The complaint in this case fails to allege any facts from which could fairly infer that the RNO -- in that case the hedge fund -- lawyer had any duty to plaintiffs, the investors, their status as investors or limited partners or shareholders in the Bayou entities, does not create the necessary attorney/client relationship.

Briarcliff (phonetic), a case also involving the law firm of -- Frankfurt Garber (phonetic) law firm, this is from the First Department:

Even if the defendants' investors, limited partners had represented the partnership -- I'm sorry, defendants were the lawyers -- had represented the partnership or the general partner, they would not have owed a fiduciary duty to plaintiff who was a limited partner.

Now, our brief goes, and I am leaving it to the brief, holding, after holding, after holding, that if I represented an LP, my duty is to the LP. My duty is to the entity, not to the constituency of the entity.

And then I saw, I turn to their brief, and I see in their brief a statement that says, on page 13:

New York courts have squarely, not roundly, squarely held that a lawyer for a limited partnership

owes the limited partnership fiduciary duties, and I stopped there.

I said, wait a minute. I have been doing this stuff for a long time. I have never heard that. What is the case? I pull out the case. It is a Southern District case called Steinfeld vs. Marks (phonetic). Here is what Steinfeld vs. Marks says:

It says, an attorney retained by an entity generally owes his allegience to the entity rather than the individual constituency of the entity.

Cites a very well known case called Quintella (phonetic). The law firm did not owe any duty to the limited partners, and that goes onto say:

An attorney, under some circumstances an attorney may also be an attorney for the individual constitutents, and it goes through a couple of cases, Judge.

And what it says in those couple, what those couple of cases say is if you have got -- when you got a closely held family corporation or something of that ilk, you may well be found to be a lawyer for the entity.

And in the Steinfeld case, in the Steinfeld case, there were two equal co-ventures, only two, and plaintiffs were the lawyers. The guy who hired the law

firm and alleged that he had a individual, personal attorney/client relationship with, so I was relieved.

This case is meaningless. It says nothing. It does not contradict the long-standing law of this State that if you represent an LP you do not represent and you do not owe a duty to the individual constituents, including the limited partners.

We have nothing like that here. We have hordes of investors and a law firm which prepares forms, the organization prepares the basic documents and then leaves it, the hedge fund, to go off on its own.

Now, I might add that at least four of these plaintiffs, I will get to that later, were not even LPs. They are never LPs, and so they could not claim that fiduciary obligation at all. But, my main point, your Honor is surely familiar with 5019 of the Code of Professional Responsibility, organization clients that you owe a duty, it is just basic to the organization, not to the constituents.

What does it mean? What does that mean for their claims here? And I will just do it claim by claim because it is too important not to.

They have a fraudulent omission claim that I failed to disclose to the world the facts I knew about

Wood River. There is no such thing as a fraudulent omission claim, and we heard it well expressed in the argument, the lengthy argument just before this one. There is no such thing as a fraudulent omission claim without a fiduciary duty dispute.

The second claim is a breach of fiduciary duty claim. There is no breach of fiduciary duty unless there is a fiduciary duty, and there is no fiduciary duty to constituents.

The other tort claims are aiding and abetting. Aiding and abetting has two components: Actual knowledge and substantial assistance.

Substantial assistance for lawyers, there is case after case uncontradicted by my adversaries that a lawyer cannot be liable for aiding and abetting a client simply by not saying anything. Silence does not equal substantial assistance. Gross, rather neglect misrepresentation. There must be a duty to speak. It is in contrast to the case we just heard about where you had a director talking to people to whom he owed a fiduciary duty. Here, there is no duty to speak. And he actually spoke in the case ahead as I understand the argument. So, no court, no court has ever adopted the theory of liability, lawyer liability that they are attempting to impose on my client. My client owed no

duty to these plaintiffs, except the ones I am about mention again, and, in the absence of that duty, all their claims go, except one.

THE COURT: Is there any allegation in the complaint that the Seward firm knew of the misrepresentations, the alleged misrepresentations in the offering memo?

MR. GOTTHOFFER: Yes.

MR. HARPER: In fact, there is no allegation in the claim, your Honor. Let me take it in parts. There is no allegation in the complaint it is Seward.

THE COURT: I did not find it.

Plaintiff, what paragraph?

MR. HARPER: May I?

MR. GOTTHOFFER: I am sorry, I did not hear you.

THE COURT: I was looking at it. I did not find a specific allegation.

MR. GOTTHOFFER: Yes, your Honor, let me suggest your Honor turn to Paragraph 88 of the complaint.

THE COURT: I thought I read that already.

MR. GOTTHOFFER: And, if I may just take you down to the portion that I think will answer your question.

Proceedings

THE COURT: Well, it is not in 88.

MR. GOTTHOFFER: 88 is the starting of the portion, but there are two particular misrepresentations that we say Seward knew were false.

If you go to 99, you will see that with respect to whether there was an auditor, in fact, appointed -- remember, this is the case where AMEX was supposed to be the auditor, but it never audited -- you will see the allegation, but it follows, it follows from specific statements that read to that conclusion, and that is one part of it.

THE COURT: All right. Let me turn to defendant's counsel.

I am looking now, I did not see it before, Paragraph 99.

MR. HARPER: Pardon?

THE COURT: Quote:

"Seward thus knew the statements in the Wood River offering memorandum were false."

MR. HARPER: Which paragraph? I'm sorry.

THE COURT: 99. 99, page 127 of the complaint.

MR. HARPER: Yes, I see that allegation in itself is wholly inadequate. I mean that does not need any particular later requirement. It does not give me

any facts. It is just a conclusion.

THE COURT: That is true.

MR. GOTTHOFFER: Your Honor.

MR. HARPER: So, let me answer the question in this way, in pieces, if I can, because time has its importance here too.

The offering memorandum is done in February or so of 2003. All right. And in fact, eight of these plaintiffs buy in 2003 or 2004. There is no allegation anywhere in this complaint that I knew that any statement, if there was any statement in the offering memorandum, and some of it was very promissory, that any statement was false when made in 2003.

There is no allegation, factual allegation in this complaint by which they could point to that says I knew in 2003 that that AMEX was not the auditor, and, in fact, they are really of two minds because they stand up, Judge --

THE COURT: Show me.

MR. HARPER: They stand up, Judge, in front of you before and they say, You know, what AMEX was the auditor.

They got to make up their mind.

MR. GOTTHOFFER: I am trying, Judge. I did not want to cut off Mr. Harper.

Proceedings

THE COURT: Okay.

MR. GOTTHOFFER: Okay. Let me take you to Paragraph 99, is the conclusion to be drawn from the paragraph that preceded it, just like you will see in Paragraph 105, we say they knew that Wood River was violating the provisions of the offering memorandum about a 10 percent cap, they knew of the End Wave investment. So, you have got to read the paragraphs that lead up to this. So, if I may take you through.

THE COURT: So, you are saying Seward & Kissel knew while this was ongoing --

MR. GOTTHOFFER: That is correct.

THE COURT: (Continuing) -- that a fraud was being perpetrated on the investors of the hedge fund.

MR. GOTTHOFFER: And, your Honor, absolutely. And the important part, there is not in this case --

THE COURT: Now, wait a minute. It is pretty clear under the code that a client, when a client starts to defraud a third-party, it puts the attorney in an ethical dilemma.

MR. HARPER: Absolutely, your Honor.

THE COURT: It is usual to resign the representation.

MR. HARPER: It is not required, but it does put a lawyer, put a lawyer in an ethical dilemma.

Proceedings

THE COURT: You counsel the client to cut it out, and, if you do not, you have to make a decision as to whether or not resign the representation or not.

MR. HARPER: Correct. Under DO710B -- 10A2, I think it is, a lawyer who learns that a client is engaged or perpetrating a fraud --

THE COURT: An ongoing fraud.

MR. HARPER: (Continuing) -- an ongoing one shall promptly reveal it, unless it is protected as a confidence or secret.

So, if I am a lawyer --

THE COURT: In which case you take a hike.

MR. GOTTHOFFER: Exactly.

MR. HARPER: Your Honor, with all due respect, if I am advising my law firm what to do, if I have that knowledge, and we will get into what they allege is the knowledge because I think that is a very important part of it, but if I am advising my law firm, as I do on these issues, I am taking a hike, but sitting on ethics committees in considering this issue, plenty of ethics committees and plenty of law that say I do not necessarily have to abandon that client. What I cannot do is participate in the commission of the fraud. So that if I am representing a client, for example, in something that is completely unrelated to the fraud, I

could continue to represent the client.

THE COURT: Yes, you are right.

MR. HARPER: I do not have that ethical dilemma. So, it is not as in New Jersey. On the other hand, if we were across the river, under the rules of professional conduct in New Jersey, I would have an obligation today to blow the whistle on my client.

If I were operating under the model rules of present conduct of ABA, I would have an obligation to notify my client. But under the Kosack (phonetic) provisions, if you, if you get the commission on the standards for attorney conduct that is under work in New York in the revision of the code, I would not. And certainly under the code of professional responsibility as it exists today in New York and existed at the time of these transactions and occurrences I do not.

THE COURT: But, the attorney was participating in the ongoing fraud.

MR. HARPER: If the attorney is knowingly participating and facilitating the fraud, no question about it.

But what the cases all say, Judge, and they are cited in our brief, our opening brief, our reply brief is that simply being quiet and going on and doing the other work, the fact that I do not make a noisy

withdrawal or send a press release, God forbid, I would be in ethics jail. I would be a press release out.

THE COURT: I understand that, but, obviously, my concern, it seems this is going to be very fact specific.

MR. HARPER: Your Honor, I really think this is.

THE COURT: It is one thing to say -- Seward & Kissel, I assume, were not representing the hedge fund in landlord and tenant court?

MR. HARPER: Correct.

THE COURT: And but, on the other hand they probably were not making the decisions that ended up in the collapse of the hedge fund?

MR. HARPER: Absolutely.

THE COURT: Somewhere in between they fall. The question is what side of the line do they fall on.

MR. HARPER: Right.

THE COURT: Is that something I could determine on the motion to dismiss?

MR. HARPER: Yes. What you do on a motion to dismiss, what has been done in countless cases involving lawyer liability, again we have to talk about whether I owe a duty. If I do not owe a duty, all the claims go, and they do not have a case, and

there is no case under the New York law where my duty runs to them.

THE COURT: But, wait a minute. But the duty --

MR. HARPER: If the receiver wants to sue me.

THE COURT: Now, we are treading on dangerous ground. I know this is an evolving area of ethics law. But the duty, the duty really depends on the consequences of the act. If, if you are aware of the -- if the attorney is aware the client is engaging in an ongoing fraud and the attorney is doing, and I do not want to be too theoretical here, is doing anything to aid and abet that fraud, and some people say we are just representing the corporation is enough. I do not know if that is in this case, this particular case, but you have to look at what the impact is going to be to third parties.

MR. HARPER: Well, your Honor.

THE COURT: And that's why I say this seems to be fact driven.

MR. HARPER: I do not owe a duty to third parties, period.

THE COURT: Let's take the extreme example. You are counsel for Seward & Kissel who is counsel for the hedge fund. The hedge fund is actively

participating in a fraud of investors, and you are clearly aiding and abetting in that fraud. That is what they are alleging.

MR. HARPER: They are not alleging, they are not alleging facts, they are alleging conclusions to that. But let me take that example, Judge.

THE COURT: I want to.

MR. HARPER: Suppose I know, suppose I know, as they allege I know, I knew that this fella had or the fund had gone over 5 percent or 10 percent and not filed.

Now, one very important preliminary point, my knowledge that they own 5 or 10 percent of a particular company may mean that I know something about securities laws obligations. It tells me nothing about whether that is 10 percent of the fund's assets, unless I know what the fund's assets are. And show me anywhere in this complaint, anywhere where these people allege that I had actual knowledge of how much money, how much money -- let me finish my point.

MR. GOTTHOFFER: I have not said a word.

THE COURT: You made your point.

Tell me.

MR. GOTTHOFFER: Paragraph 91.

MR. HARPER: Paragraph?

Proceedings

MR. GOTTHOFFER: 91.

THE COURT: 91 of the complaint.

I love specific answers.

MR. GOTTHOFFER: I know. I want to give you some so badly.

THE COURT: All right. 91, based upon the receiver documents, I take it those are the documents that you obtain from the SEC receiver?

MR. GOTTHOFFER: That is correct, your Honor.

THE COURT: Seward knew the importance to investors of accurate liquidity asset level, and like disclosures in the Wood River offering memorandum and John Cleary, a partner wrote, and I will read this to myself.

(Pause).

THE COURT: Oh, I see, so a Seward partner writes to Whittier (phonetic).

MR. GOTTHOFFER: Where as the principal of Wood River.

THE COURT: You indicated to me some liquidity issues. We should have discussion regarding the issues, the performance of the fund, the asset level, and whether there needs to be disclosure. Okay.

MR. GOTTHOFFER: And, your Honor, may I make one other point?

Proceedings

THE COURT: Hang on.

MR. HARPER: Could we put in a date?

THE COURT: So clearly, Mr. Cleary has some knowledge. We do not know how much, but he has -- you have a basis to allege that Cleary has knowledge as to what is going on in the fund.

MR. HARPER: That is wrong, Judge.

MR. GOTTHOFFER: Your Honor, may I have one point?

THE COURT: Yes.

MR. HARPER: The date, Judge, look at the date of the letter.

THE COURT: April 2002.

MR. HARPER: April 2002 there is no Wood River fund.

MR. GOTTHOFFER: They are --

MR. HARPER: It does not go to market until 2003. Even they plead that.

What that is referring to, Judge, and we are way off record, outside the record, way outside the pleading, is that John Whittier had a previous fund where he managed purely family money, all right, and the letter is referring to that fund, not the Wood River fund which did not come into existence -- no money, not a nickel was raised --

MR. GOTTHOFFER: That is not correct.

MR. HARPER: (Continuing) -- until 2003.

MR. GOTTHOFFER: You read the last line of the e-mail; he is talking about the new fund. This was the new River Fund startup that we are talking about. Mr. Harper does not want me to get to that. There was not one offering memorandum for the Wood River fund, there was a series offered all by Seward, preparing as counsel, starting in 2003. There were about a dozen between 2003 and June of 2005, and each of them Seward wrote, "AETB is the auditor," not will be, not we are looking toward them. "(B) The fund will be diversified and investment will be capped," not typically, "will be capped at 10 percent of the fund's assets."

They wrote that, your Honor, even after they knew there was no auditor, not AMEX, not anybody. They wrote that, your Honor, after they knew that Wood River had at some point an investment, and they knew this because Whittier told them of 12 million shares in End Wave, a stock that had 10 million shares outstanding. So, over 20 percent at a dollar value that Seward, which formed the fund, was aware of asset values, was concerned about asset values, knew or had to know, unless they were willfully blind, not doing what they say in Paragraph 91 they were doing, but that this was

about 20 percent of the fund's assets. They knew that there was no SEC filing because Seward was the only --

THE COURT: What is the timing overall of this?

MR. GOTTHOFFER: I would be happy to give you the timing, if I may please.

MR. HARPER: This is --

MR. GOTTHOFFER: Which one would you like us to answer?

THE COURT: Yes, please answer the question.

MR. GOTTHOFFER: The timing on when Wood River acquired that knowledge starts, I do not have it down pat because I have not had discovery, but what we have seen, in October of 2004.

THE COURT: You mean Seward, not Wood River.

MR. GOTTHOFFER: Yes, we have not had discovery. In October of 2004, Seward learns that Wood River has a large investment in End Wave, and they, in this context, learn this because they are doing a termination agreement with an employee who brought End Wave to Wood River, and the parties Wood River, and Mr. Foster, the employee have reached an agreement that if End Wave hit a particular price on a particular day, he would get a big bonus. The stock almost hit the price, but did not.

Proceedings

Mr. Foster, in December of '04 writes complaining that the reason it did not hit that price was because Whittier dumped a large amount of End Wave shares on the market to drive the price down.

Seward's response on behalf of Wood River says that is totally false, absolutely ridiculous, Mr. Whittier never had any such power, never had any such sovereignty.

May I ask you to look at Exhibit A to the complaint. I believe it dated January 27th, 2004.

THE COURT: 2005.

MR. GOTTHOFFER: 2005, forgive me.

THE COURT: Yes.

MR. GOTTHOFFER: And if you look at the second page, you will see that the lawyer for Mr. Foster is telling Seward all about the End Wave holdings and the facts.

THE COURT: Where this is?

MR. GOTTHOFFER: This is the first paragraph, your Honor.

THE COURT: What, line 1?

MR. GOTTHOFFER: One, two, three, four, five, six lines down beginning with, "For example."

THE COURT: Yes.

MR. GOTTHOFFER: You have that?

Proceedings

I am let you read it, if you would.

(Pause).

THE COURT: Yes.

MR. GOTTHOFFER: Now, so they are aware or that there is a charge that they own, Wood River owns more than 15 percent of the stock, which, as you know you mentioned consequences before, a consequence of owning more than 10 percent of the shares of the public company like End Wave is that you lose any profit you make on sales or by buy sells within 6 months, the short swing profit rule, anyone reading this, and Seward lawyers are very sophisticated people, know that the End Wave holdings in the Wood River fund mean it is a death pack for the investors. If End Wave goes down, they take the hit. If End Wave goes up, they do not get the benefit. There is no SEC filing because Seward has been the sole lawyer for Wood River at least, and there is a different percent provision in the offering memorandum, so investors do not know how their money is being invested.

What happens is you could take a look at Exhibit 9 to compendium, which I think you have. Seward talks to Mr. Whittier. Whittier apparently gives Seward some documents with some disputes with Mr. Foster.

Proceedings

If you go to the Exhibit 9.

THE COURT: Is that the instant messaging?

MR. GOTTHOFFER: I refer you, your Honor, to, it is Page 3, and I believe the underlying, the salient portion that Mr. Whittier is saying I owned over 2 million shares of End Wave, and this is a document you could see from the Bates number, down on the box Seward & Kissel document.

MR. HARPER: Your Honor, may I go back to the original question you asked counsel to answer?

MR. GOTTHOFFER: Your Honor, may I finish? I think it may be enlightening for the Court.

THE COURT: Go ahead.

MR. GOTTHOFFER: Thank you.

If you look at Exhibit 13, which also has a Seward number on it, you will see that it is research Seward was doing in respect of -- I'm sorry, in respect of End Wave, and, if you do the arithmetic at the time, you take the market cap, you divide it by the price, you are going to wind up with the number of shares outstanding, and that would be about 10 million shares.

THE COURT: 20 percent.

MR. GOTTHOFFER: It is a heck of a lot.

Now, with all of that, and this is all set out in the complaint, what does Seward do?

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It structures an agreement with Mr. Foster where Mr. Foster gets payment, gives up his claim and agrees never to talk with anyone about Wood River's holdings again.

Almost immediately thereafter, that is, you asked when that was, I believe that was April or May of 2005, from May of 2005, your Honor, you got to read this in the complaint because if I tell you, you would not believe me, Paragraph 107, okay.

MR. HARPER: Believe it or not.

MR. GOTTHOFFER: Would you like to see a document or two, Mr. Harper, that would support it?

Your Honor, may I continue?

THE COURT: Yes, please.

MR. GOTTHOFFER: And then I will, I will ask you to read 107 through 111.

THE COURT: Now, I turn to the defense.

MR. GOTTHOFFER: Thank you.

MR. HARPER: Let me go back, if I could, Judge, to the question you actually asked plaintiffs' counsel, which, because I had made a statement to the effect there was not a single line in the complaint in which they alleged Seward & Kissel knew how, what the total assets of the fund were at any point.

And what he did was point you to Paragraph 91,

a letter written almost a year before the fund had even raised ten cents, let alone, any paragraph that says, at this point in time, Seward & Kissel knew that the hedge fund had only $300 million or $500 million, Judge, when American felt it had 9 billion.

Seward & Kissel had -- there is not an allegation in this complaint, there is not an allegation in this complaint that Seward & Kissel at any time knew whether this fund had 300 million, 500 million, 3 billion, 10 million.

And all of these numbers, that he is throwing around to you, let me use the number in the instant messages that you know mean absolutely nothing unless you know what the amount of the fund assets are.

THE COURT: Well, it would mean, it would mean something in light of the percentage that that the fund owned in End Wave.

MR. HARPER: No, sir.

THE COURT: It would not?

MR. HARPER: No.

THE COURT: Excuse me.

MR. HARPER: Your Honor, let me explain. Let me explain. He just pointed you to an instant message and said, Oye, 2 million shares. And, he says also where in his brief they were trading at $15. Actually,

it never hit 15. It was below. Let's use 15 because it is easier to do the math. Two million times 15 is 30 million.

THE COURT: I do not care. It is the percentage of the ownership of End Wave which is important.

MR. HARPER: He is not enforcing the anti-trust laws, Judge. He is not suing me for aiding and abetting security law. He is not suing for aiding and abetting a violation of the security law, neither is the SEC. Either of these hedge funds file their own forms for the 5 percent or 10 percent, 15 percent. Just because I know that he owns 10 percent does not mean he asked me to do the filing for him, and it does not mean that I have an obligation to say, Oh, I am going to file it for you. That is not what the allegation is, Judge.

And, what he is really trying to use it for is to show you that somehow I knew that it comprised more than 10 percent of the fund assets, and that is why I challenged him to say where in his complaint does he allege that I knew what the fund's assets were.

Number two, suppose I did know that, Judge. Suppose, I did know that he did not file with the 5 percent or the 10 percent, Judge. What, what is,

what is the consequence of that knowledge to him?

I cannot send out a press release to the investors saying, Oh, by the way, I just learned in a confidential communication covered by the Code of Professional Responsibility covered as a confidence in secret, which I am forbidden to divulge, that my client had not filed under the 5 percent or 10 percent rule.

THE COURT: Until --

MR. HARPER: What is my consequence? What is my obligation.

THE COURT: Until we -- I, the Court knows what the relationship was between Seward & Kissel and the fund, and what activities the firm was taking on behalf of the hedge fund, it is difficult for me to know what to do with, example Paragraph 106, of the complaint.

MR. HARPER: Well.

THE COURT: You are asking me, you are asking me to rule in essentially in a vacuum.

MR. HARPER: I am asking you to rule on the basis of the complaint. Before you get to all -- before you get to put on your website --

THE COURT: Excuse me. Excuse me. There are limitations as to what the Court's reasonable expectation is for a pleading. There is only so much

information a plaintiff can allege.

MR. HARPER: May I address that point?

THE COURT: Excuse me.

MR. HARPER: I'm sorry.

THE COURT: There are allegations in this complaint that, obviously, need to be fleshed out. There are issues that I think probably would be, would be more -- certainly, I would be more comfortable dealing with if it was in the form of summary judgment. You are asking at the earlier stage in the proceeding for me to essentially give Seward & Kissel a get-out-of-jail-free card in light of some fairly specific allegations considering the fact that there has been no discovery.

MR. HARPER: Well, your Honor, may I address very briefly the discovery point, and then move onto the main point because you do have, with the utmost respect, an obligation to regulate the courthouse door by making sure that these plaintiffs, before they put on their website that they are suing my firm for $200 million, before they go out and solicit other investors to sue me, and before they put it on the front page of the New York Law Journal, they have to do certain things before they engage in millions of dollars worth of discovery. They have to satisfy

certain pleading requirements. And, what I am suggesting to you is on Bayou and every case that precedes Bayou's complaints like this have never gotten past the pleading stage.

But let me talk about discovery because he, in fact, has had the benefit of discovery in two ways.

THE COURT: I really, I really, I really reject the notion that just because other cases have been dismissed against other law firms that Seward & Kissel is entitled to an automatic dismissal.

MR. HARPER: I know what you are saying.

THE COURT: The argument is finished.

The motion is marked submitted.

Thank you very much.

MR. GOTTHOFFER: Thank you, your Honor.

MR. HARPER: Thank you, your Honor.

(Whereupon, these proceedings are recessed.)

CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT

Margaret Baumann

MARGARET BAUMANN
OFFICIAL COURT REPORTER